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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

JOSEPH PATRICK DOHERTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amicus curiae, the American Civil Liberties Union ("ACLU"), is a nationwide non-partisan organization of nearly 300,000 members dedicated to protecting civil rights and civil liberties. Since its founding, the ACLU has sought to ensure that the protection of the Constitution and laws apply equally to all persons, including immigrants and refugees. In particular, the ACLU, through its Immigrants' Rights Project, has engaged in litigation and advocacy to secure the rights of persons seeking political asylum in the United States, to implement the Refugee Act of 1980, to insure that asylum decisions are governed by neutral criteria unaffected by United States foreign policy, and to enforce the right to a meaningful hearing at which claims are presented and adjudicated.

Amicus curiae, the American Immigration Lawyers Association ("AILA"), is a national association of lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has a serious interest in the case now before this Court because the issues directly involve the practice of immigration law. AILA wants to ensure that any developments in immigration law facilitate the administration of justice and maintain the integrity of the basic structure of immigration law.[1]

SUMMARY OF ARGUMENT

At stake in this appeal is the fairness and adequacy of the procedures available to an alien seeking to reopen his or her deportation proceeding to apply for withholding of deportation or asylum. Joseph Doherty seeks only a "fair opportunity to develop and present" evidence in support of his claims. *INS v. Abudu*, 485 U.S. 94, 107 (1988). The INS contends that it may deny Doherty's claims without providing

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1 *Amici* have the consent of the parties to file this brief. Letters of consent have been filed separately with this Court.

him with a hearing and the opportunity to prove his eligibility for both withholding of deportation and asylum.

The Attorney General's erroneous interpretation of the requirements for a motion to reopen led to the denial of Doherty's claims. It is well settled, under both INS regulations and case law, that there are two threshold requirements that must be satisfied before a motion to reopen will be granted: (1) the movant must establish a *prima facie* case for the underlying relief sought, and (2) the movant must present "previously unavailable, material evidence," or a "reasonable explanation" for his or her failure to initially request asylum. *INS v. Abudu*, 485 U.S. at 104-05 (citations omitted). Doherty has satisfied both of these threshold requirements.

In challenging Doherty's compliance with the two threshold requirements, the INS argues that new evidence submitted in support of a motion to reopen must have been unforeseeable at the time of the initial deportation hearing. This foreseeability requirement is unprecedented, not based in regulation or case law, and will create an administrative nightmare for asylum practitioners and adjudicators alike. Aliens will be compelled to submit requests for asylum based on the possibility that conditions may arise that might lead them to fear persecution. A foreseeability requirement will needlessly burden the asylum system.

In *Abudu* this Court stated a third ground for denying a motion to reopen explicitly limited to "cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, *but not withholding of deportation*). . . ." *Abudu*, 485 U.S. at 105 (emphasis added). When reopening is sought for a discretionary claim, the Attorney General may determine that the movant would not ultimately be entitled to a discretionary grant of the relief sought. This third basis for denying a motion to reopen under *Abudu* is inapplicable to an application for non-discretionary withholding of deportation. Since Doherty satisfied the two threshold requirements governing a motion to reopen, he must be granted a hearing to determine his eligibility for withholding under section 243(h).

Withholding of deportation is accorded a special place in our immigration laws because it fulfills the United States' obligations under international covenants which ensure that a refugee is not returned to a country where he or she faces persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987); *INS v. Stevic*, 467 U.S. 407, 416-17 (1984). Moreover, a hearing is all the more essential because of the complex factual issues that must be explored in determining eligibility for withholding, such as the extent of persecution faced by an alien, the alien's motives, the severity of any alleged crimes committed and the context of his or her activities, and any mitigating or aggravating circumstances.

Because withholding of deportation is such a fundamental protection, this brief focuses on INS' obligation to afford Doherty a hearing on his withholding claim. Doherty, however, is also entitled to a hearing on his asylum claim. While a motion to reopen for asylum may be denied by concluding that the movant would not ultimately be granted asylum, the INS does not have unfettered discretion to deny asylum. A denial of asylum based on foreign policy considerations contravenes the purpose of the Refugee Act of 1980. Because the elimination of foreign policy considerations from asylum determinations under international law and by the intent of Congress is fully discussed in other *amici* briefs, we will not repeat those arguments here. *See* Brief of *Amicus Curiae* United Nations High Commissioner for Refugees [hereinafter UNHCR] and Brief of *Amici* Members of Congress. We will demonstrate, however, that the INS itself recognizes the inappropriate nature of foreign policy concerns through the promulgation of the 1990 INS asylum regulations and its commitment to the recent settlement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991) [hereinafter *ABC* Settlement].

ARGUMENT

I. DOHERTY SATISFIES THE THRESHOLD REQUIREMENTS UNDER *INS V. ABUDU* GOVERNING MOTIONS TO REOPEN TO APPLY FOR WITHHOLDING OF DEPORTATION.

The most fundamental safeguard available to an alien who fears persecution is withholding of deportation under section 243(h) of the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101, 1253(h) (Supp. 1990)) (PA at 165a)[2] [hereinafter INA]. Section 243(h) provides that the "Attorney General *shall* not deport or return *any alien* . . . to a country" if the alien demonstrates a clear probability of persecution in that country. *Id.* (emphasis added); *INS v. Stevic*, 467 U.S. at 421-22. Unlike asylum, which contains an element of discretion, withholding of deportation is mandatory if the alien satisfies the statutory criteria. *INS v. Stevic*, 467 U.S. at 421 n.15. Withholding of deportation may be sought when an alien is initially subjected to deportation proceedings or, if requested subsequent to the time for initial submission, pursuant to a motion to reopen under the governing regulations. *See* 8 C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a).

In *INS v. Abudu* this Court emphasized that there are two "threshold" requirements for a motion to reopen: (1) the movant must establish "a *prima facie* case for the underlying substantive relief sought," and (2) the movant must present "previously unavailable, material evidence, 8 C.F.R. § 3.2," or, the movant must "reasonably explain his failure to apply for asylum initially, 8 C.F.R. § 208.11." *Abudu*, 485 U.S. at

2 Citations to the appendix that accompanied the Petition for Writ of Certiorari are made to the page number therein as "(PA at _____)." Citations to the joint appendix that accompanies the Petitioner's Brief are made to the page number therein as "(JA at _____)."

104-06. Doherty has met both of these threshold requirements.[3]

The first requirement, that the applicant establish a *prima facie* case, is based on long-standing Board of Immigration Appeals' [hereinafter BIA] precedent. *See INS v. Jong Ha Wang*, 450 U.S. 139, 141 (1981) (citing *Matter of Lam*, 14 I. & N. Dec. 98 (BIA 1972); *Matter of Sipus*, 14 I. & N. Dec. 229 (BIA 1972)). The second requirement, that the applicant present "previously unavailable, material evidence" or "reasonably explain" the failure to apply initially, is drawn from the language of sections 3.2 and 208.11 of the regulations. See 8 C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a).[4]

A. Doherty Established a *Prima Facie* Case for Both Asylum and Withholding of Deportation.

The INS does not dispute that Doherty satisfies the "*prima facie* case" requirement for reopening. The Attorney General's decision expressly assumes that, if returned to the United Kingdom, Doherty's " 'life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion. . .' " under the standard governing eligibility for withholding of deportation. *In re Doherty*, Att'y Gen. Dec. at 28 (June 30, 1989) (PA at 83a) [hereinafter Att'y Gen. Dec.]. In reversing the BIA's grant of Doherty's motion to reopen, the Attorney General explicitly stated that "[i]t is unnecessary for me to address (and I do not) the question of whether [Doherty] has established a *prima facie* case

3 *Abudu* also recognized a third ground for denying a motion to reopen where the underlying relief being sought is *discretionary*. *Abudu*, 485 U.S. at 105-07. As discussed in Part II, *infra*, this Court specifically noted that this third basis for denial does not apply when the applicant is seeking the *non-discretionary* relief of withholding of deportation. *Id.* at 105.

4 In *Abudu* this Court held that a motion to reopen a claim for withholding of deportation must meet the requirements of either sections 3.2 or 208.11. *See Abudu*, 485 U.S. at 99 n.3. ("the BIA's application of [section 208.11], which on its face applies only to asylum requests on reopening, will also usually be dispositive of its decision whether to reopen to permit a withholding of deportation request.").

for the *substantive relief sought.*" *Id.* at 15 n.21 (emphasis added) (PA at 64a). Thus, Doherty is presumed to have met his burden of demonstrating *prima facie* eligibility for withholding of deportation (as well as for asylum).[5] *Doherty v. INS*, 908 F.2d 1108, 1115 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 950 (1991); *see also Jen Hung Ng v. INS*, 804 F.2d 534, 538 (9th Cir. 1986); *Mattis v. INS*, 774 F.2d 965, 967 (9th Cir. 1985).

B. Doherty Presented "Previously Unavailable, Material Evidence" and a "Reasonable Explanation" in Support of His Motion to Reopen.

The second threshold requirement for reopening is the presentation of "previously unavailable, material evidence," or a "reasonable explanation" for the alien's failure initially to apply for the relief sought. *Abudu*, 485 U.S. at 104-05 (citing 8 C.F.R. §§ 3.2 and 208.11 (1987)).[6] Doherty satisfied this

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5 The INS' argument that the evidence offered by Doherty in support of his motion to reopen was held by the BIA to establish only a *prima facie* case for *asylum* and that no finding was made whether that evidence established a *prima facie* case under the higher standard for mandatory *withholding of deportation* (Brief for the Petitioner at 6-7 n.5, 35 n.20) [hereinafter Pet. Br.], is contradicted by the BIA's decision below. The BIA explicitly reopened Doherty's case to apply for *both* "asylum and withholding of deportation." *Matter of Doherty*, BIA File No. A261852, at 6-7 (BIA Nov. 14, 1988) (PA at 99a-100a) [hereinafter BIA Dec.].

Because the question of whether Doherty established a *prima facie* case is not before this Court, there is also no reason to address the possible adoption of a "unitary abuse-of-discretion standard of review." Pet. Br. at 38-39. In any event, a unitary standard is inappropriate because the first prong of *Abudu*, whether an alien has presented sufficient evidence to make a *prima facie* case, must be judged under a "substantial evidence" standard since it involves a review of factual findings. *See Ipina v. INS*, 868 F.2d 511, 513 (1st Cir. 1989) (factual findings determining withholding of deportation governed by substantial evidence standard of review); *Pierre v. Rivkind*, 825 F.2d 1501, 1505 (11th Cir. 1987) (same); *Caravajal-Munoz v. INS*, 743 F.2d 562, 567 (7th Cir. 1984) (same).

6 Section 3.2 of the regulations requires that the new evidence offered to support reopening must be "material" and "could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2 (1987) (PA at 165a-66a). It further provides that relief must be "sought on the basis of circumstances which have arisen subsequent to the hearing." *Id.* In addition, section 208.11 requires that the movant must "reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding." 8 C.F.R. § 208.11 (1987) (PA at 166a). Both sections govern reopening for withholding of deportation. *See supra* note 3.

burden of presenting previously unavailable evidence on two independent grounds. First, the Extradition Act of 1987[7] between the United Kingdom and Ireland became effective on December 1, 1987, fifteen months after the withdrawal of Doherty's initial application for withholding and asylum and the Immigration Judge's order that Doherty be deported to Ireland. Implementation of the Extradition Act of 1987 was a material change because it amended Irish extradition law in a manner that would guarantee Doherty's extradition to the United Kingdom if he were deported to Ireland. Second, Attorney General Meese rejected Doherty's designation and the Immigration Judge's order that he be deported to Ireland under INA section 243(a). INA § 243(a), 8 U.S.C. § 1253(a). This unprecedented refusal by the Attorney General materially affected Doherty's fear of being returned to persecution in the United Kingdom.[8] Both of these material changes also constitute a reasonable explanation for Doherty's failure to pursue his initial claim.

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7 Extradition (European Convention on the Suppression of Terrorism) Act, No. 1 (1987) (JA at 96-108) [hereinafter Extradition Act of 1987]. The Extradition Act of 1987 applies to offenses where the warrant is issued after December 1, 1987. *Carron v. McMahon*, [1990] I.L.R.M. 802, 805-06.

8 In their brief on the merits, the INS chooses not to address the findings of both the BIA and Court of Appeals that Attorney General Meese's unprecedented decision to prevent Doherty from being immediately deported to Ireland satisfied the threshold requirement for "previously unavailable, material evidence" and a "reasonable explanation." Pet. Br. at 46; *But see Doherty v. INS*, 908 F.2d at 1115-16; BIA Dec. at 6-7 (PA at 99a).

1. Implementation of the Irish Extradition Act of 1987 on December 1, 1987 Constitutes New Evidence and a Reasonable Explanation Warranting Reopening.

a. The Extradition Act of 1987 Meets the Regulation's Requirements for Reopening.

New evidence of the implementation of the Extradition Act of 1987 on December 1, 1987 unquestionably satisfies the requirement that the movant present previously unavailable material evidence or a reasonable explanation for failure to apply initially.

When Doherty was first arrested in June 1983, he immediately applied for withholding of deportation and asylum. His requests were stayed for the next three years while the United Kingdom unsuccessfully sought his extradition, and the United States appealed. In September 1986, when Doherty's deportation proceedings resumed, he designated Ireland as his country of deportation pursuant to INA section 243(a), and only then withdrew his requests for withholding and asylum. The Immigration Judge ordered Doherty immediately deportable to Ireland, but the INS appealed the decision on the ground that his return would be "prejudici[al] to the interests of the United States." INA § 243(a), 8 U.S.C. § 1253(a); *see Doherty v. INS*, 908 F.2d at 1111 (PA at 4a). During the pendency of the INS' appeals, the Extradition Act of 1987 went into effect. As a result, deportation to Ireland became the functional equivalent of deportation to the United Kingdom. Accordingly, two days after the Irish Extradition Act of 1987 came into force, Doherty filed his motion to reopen to seek withholding of deportation and asylum.

Since the Extradition Act of 1987 did not go into effect until over a year after the Immigration Judge ordered Doherty deported to Ireland, the requirement of section 3.2 that the evidence "could not have been presented at the former hearing" is clearly met. 8 C.F.R. § 3.2 (1987). Likewise, implementation of the Extradition Act of 1987 satisfies the requirement of section 3.2 that Doherty's claims for asylum and withholding must be sought "on the basis of circumstances which have arisen subsequent to the hearing." *Id.* The entering into force of the Extradition Act of 1987 also constitutes "material" evidence because it would result in Doherty's *de facto* deportation to the United Kingdom. *Id.* At the time Doherty was ordered deported to Ireland, he did not fear being returned to the United Kingdom under Irish extradition law. As shown in part 1.b., *infra*, after the implementation of the Extradition Act of 1987, his return was a virtual certainty. Evidence demonstrating that an applicant will be delivered directly to the country where he fears persecution is manifestly material.[9]

The INS argues that the enactment of the Extradition Act of 1987 cannot support Doherty's motion to reopen because any change in *Irish* law is unrelated to the merits of Doherty's underlying claims for asylum and withholding of deportation from the *United Kingdom*. Pet. Br. at 48. The INS ignores that this change in Irish law subjected Doherty to immediate extradition to the United Kingdom if he were returned to Ireland. Thus the change in law resulted in a new and direct threat that Doherty would be subject to the persecution he feared in the United Kingdom.

The INS' argument is also based on a reading contrary to the language of the regulations. Section 3.2 does not limit "material" evidence to that which relates solely to circumstances in the country where a movant fears the persecution will occur. Such a limitation would be contrary to the plain meaning of the regulations' requirements that a movant present evidence of changed "circumstances," or a "reasonable explanation." *See* 8 C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a). These requirements necessarily include factors that increase the likelihood of persecution feared by the movant,

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9 Implementation of the 1987 Act also satisfies section 208.11's requirement that Doherty offer a "reasonable explanation" for his decision not to pursue his initial application. 8 C.F.R. § 208.11 (PA at 165a-66a). When Doherty withdrew his claims in September 1986, he believed (as did the Immigration Judge and the BIA) that he would be deported to Ireland and Doherty did not fear his return to the United Kingdom prior to implementation of the 1987 Act on December 1, 1987.

including changes that will result in him or her being returned to the persecuting country.

The INS' narrow reading is especially inapplicable to the circumstances of this case. The traditional reasons discussed by this Court in *Abudu* as to why motions to reopen are disfavored simply do not apply to Doherty's motion. *See Abudu*, 485 U.S. at 107 ("the reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence." (footnote omitted)). Unlike the case of an asylum applicant who failed to prove his claim after a hearing and thereafter offers new evidence, Doherty has never received a hearing in the first instance. Thus, Doherty's motion to reopen is not analogous to a petition for rehearing or to a motion for a new trial on the basis of newly discovered evidence.

In *Abudu*, this court emphasized that the "strong public interest in bringing litigation to a close" must be balanced and "consistent with giving the adversaries a fair opportunity to develop and present their respective cases." *Abudu*, 485 U.S. at 107. The INS' attempt to narrowly limit the new evidence Doherty can introduce to support reopening is contrary to what this Court acknowledged in *Abudu* to be the public interest in providing a "fair opportunity" for aliens to present their cases in the first instance.

b. The Extradition Act of 1987 Changed Irish Law and Made Doherty's Extradition to the United Kingdom from Ireland a Certainty.

The Extradition Act of 1987 changed Irish extradition law and rendered Doherty's extradition from Ireland to the United Kingdom a virtual certainty. The Attorney General abused his discretion by holding that "the 1987 Extradition Act did not constitute a material change in the law of extradition in Ireland." Pet. Br. at 47.

In September 1986, when Doherty designated Ireland as his country of deportation, extradition from Ireland to the United Kingdom was subject to the 1965 Extradition Act in

the Republic of Ireland. Extradition Act of 1965, No. 17 (1965) [hereinafter 1965 Extradition Act]. The 1965 Extradition Act provided a clear exception from extradition where the offense for which extradition was sought was a "political offence or an offence connected with a political offence." 1965 Extradition Act § 50(2)(a)(i).[10]

In contrast, the Extradition Act of 1987, which went into effect on December 1, 1987, drastically limits the "political offence" exception contained in the 1965 Extradition Act. Section 3 of the Extradition Act of 1987 lists offenses that can *never* be political offenses, withdrawing them from the exception's scope. It specifically prohibits offenses involving the use of "an explosive, or automatic firearm" from classification as political. Extradition Act of 1987 (JA at 97-99). The text of the Extradition Act of 1987 plainly creates a material change in Irish extradition law and the new limitation directly affects Doherty's ability to resist extradition from Ireland to the United Kingdom.[11] As a result of this material change in Irish Extradition Law, Doherty's return to Ireland became the functional equivalent of extradition to the United Kingdom.

2. Attorney General Meese's Refusal to Accept Doherty's Designation of Deportation to Ireland Also Constitutes New Evidence and a Reasonable Explanation Warranting Reopening.

Attorney General Meese's unprecedented decision to reject Doherty's designation of deportation to Ireland constitutes independent "material evidence" and an additional "reasonable explanation" for Doherty's motion to reopen. *See* 8

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10 The 1965 Extradition Act left the meaning of the term "political offence" for courts to decide. *See* 1965 Extradition Act § 50. Notably, this language parallels the language in the extradition treaty between the United States and the United Kingdom pursuant to which Judge Sprizzo held that Doherty could *not* be extradited since he had committed "political offenses" in the United Kingdom. *Matter of Doherty*, 599 F. Supp. 270, 275-76 (S.D.N.Y. 1984).

11 *See also* Extradition Act of 1987 (JA at 96) (preamble defines Act's purpose as to "amend and extend the Extradition Act, 1965").

C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a). Prior to Doherty's case, an alien's designation of a country that would accept him or her and an Immigration Judge's order enforcing the deportation had *never* been rejected by an Attorney General on the basis of "prejudice to the interests of the United States." INA § 243(a), 8 U.S.C. § 1253(a); *see Doherty v. INS*, 908 F.2d at 1116 (PA at 14a). Accordingly, both the BIA and the Court of Appeals recognized that "Doherty had a 'reasonable expectation' of being returned to the Republic of Ireland" at the time of his deportation hearing. *Doherty v. INS*, 908 F.2d at 1116 (quoting BIA Decision) (PA at 14a). Nonetheless, the INS contends that these unique and extraordinary circumstances do not entitle Doherty to reopen his proceedings. The INS' position is contrary to logic and leads to unworkable and counterproductive results.

Whenever an alien fears persecution, his overriding concern is to avoid being returned to the country where he faces that threat. Under these circumstances, an alien may well designate a third country for deportation pursuant to INA section 243(a), rather than endure the delays and risks of pursuing a withholding and asylum claim that could result in denial and a return to persecution.[12] If the Attorney General rejects the designation of a country that will accept the alien, that alien must have the opportunity to pursue his or her withholding and asylum claims. Otherwise, every alien who fears persecution and who designates an alternative "safe" country for deportation, will nonetheless be compelled to pursue a withholding (and asylum) application to guard against the possibility that the Attorney General will reject his or her designation of a safe country. Alternatively, aliens will forego designating a country altogether for fear that the Attorney General's intervention might foreclose their ability to initiate or reopen a claim for withholding of deportation or asylum. Instead of encouraging aliens to choose to accept immediate deportation to a designated country and thereby relieving the

12 *See, e.g.*, Note, *INS v. Cardoza-Fonseca: Establishment of a More Liberal Asylum Standard*, 37 Am. U.L. Rev. 915, 945 (1988) (noting backlogs of up to two and one half years on asylum claims).

Immigration Service of the substantial administrative burden of processing needless applications (including subsequent appeals), the system will be burdened with countless unnecessary claims.

C. There is No Basis for Requiring that New Evidence Supporting Reopening Must Be "Unforeseeable."

1. A Foreseeability Requirement Would Lead to Absurd Results in the Asylum Process.

The INS' assertion that changed circumstances must be "unforeseeable" in order to support a motion to reopen is contrary to law and leads to absurd results. The INS argues that the Extradition Act of 1987 could not support reopening because its implementation was "foreseeable." Pet. Br. at 48; Att'y Gen. Dec. at 17-21 (PA at 67a-73a). However, as the Court of Appeals and the BIA below emphasized, "[n]either the regulations nor the applicable decisional law require expressly or by implication that the new evidence be 'unforeseeable'; indeed, such a rule would lead to absurd consequences." *Doherty v. INS*, 908 F.2d at 1115 (PA at 13a); *see also* BIA Dec. at 6 (PA at 99a) ("If the respondent were expected to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum [from] any country to which he might be remotely deported, if he had a fear of returning there.").

Requiring aliens to assert claims for asylum or withholding of deportation based on both the facts and law as they exist at the time of their hearing, and any foreseeable changes that may occur in the future, will create an infinite number of issues relevant at any hearing. Political instability is endemic to many countries from which aliens seek asylum; under the INS' scenario, an applicant will be burdened with the impossible task of predicting whether any possible future changes in a country's politics may result in a fear of persecution. Withholding and asylum hearings will bog down with disputes over whether events are foreseeable and will be marked by speculative political predictions more suitable for televi-

sion political talk shows. For example, an Ethiopian national who feared persecution by the Tigrean rebels who recently seized control of the Ethiopian capital of Addis Ababa, would be expected to have made a determination as to whether that shift in power was foreseeable.

Aliens will also be compelled to submit requests for asylum on the speculative possibility that conditions might change and lead them to fear persecution. An Afghan national who fears persecution by one of the factions of the rebel resistance will be expected to predict which of seven rival Mujahedin rebel groups (if any) will overthrow the current Najibullah government. Precious resources will be expended adjudicating peripheral and speculative issues based on applications filed out of precaution rather than a fear of persecution.[13]

2. Even if Foreseeability Were Relevant, Implementation of the Extradition Act of 1987 Was Not Foreseeable.

Even if unforeseeability were engrafted onto the requirements for a motion to reopen, the change in law caused by the Extradition Act of 1987 was not foreseeable when Doherty designated deportation to Ireland in September 1986.

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13 Requiring movants to file as soon as a change in circumstances is "foreseeable" would also be inconsistent with the requirement that a movant must establish *prima facie* eligibility for relief in support of a motion to reopen. If events are "foreseeable" but have not yet occurred, the facts necessary for a *prima facie* case are unlikely to be present. For example, a change in government might be "foreseeable," but a *prima facie* case for withholding or asylum based on fear of that anticipated government could not be established until the allegedly "foreseeable" events actually occur. The requirements for a motion to reopen that apply to suspension of deportation (which requires seven years continuous residence in the United States, INA § 244(a), 8 U.S.C. § 1254(a)) or to adjustment of status (which may be predicated on marriage to a citizen, INA § 245(e), 8 U.S.C. § 1255(e)) would be similarly confused. While seven years residence or marriage to a citizen might be "foreseeable" prior to their occurrence, a *prima facie* case will not be established until the anticipated events transpire. *INS v. Rios-Pineda*, 471 U.S. 444 (1985) (seven year continuous residency requirement to establish *prima facie* case). In short, the INS effort to require both a *prima facie* case and an "unforeseeability" standard would create a virtually insurmountable barrier to motions to reopen.

The INS makes much of the fact that the European Convention on the Suppression of Terrorism [hereinafter European Convention] was signed by Ireland in February 1986—before Doherty designated Ireland. Pet. Br. at 48; Att'y Gen. Dec. at 17 (PA 67a-68a). However, the European Convention had no impact on Irish law until domestic legislation was enacted by the Irish Parliament. Such enactment remained subject to numerous uncertainties and contingencies until the day the Extradition Act actually went into effect in December 1987. These uncertainties included doubts about the survival of the major Anglo-Irish cooperation agreement that had caused Ireland to sign the European Convention in the first place, continuing domestic turmoil in both countries that threatened to dismantle the cooperation agreement, and serious legal and political concerns regarding domestic implementation of the European Convention.

Ireland signed the European Convention pursuant to the Anglo-Irish Agreement with Britain,[14] *see Complete Text of Anglo-Irish Communique on Ulster* para. 7, The Times (London), Nov. 16, 1985, at 4, col. 3 [hereinafter Anglo-Irish Communique]; Att'y Gen. Dec. at 17 (PA at 67a-68a), and its signing was a major and controversial concession[15] by the Irish government in response to concessions by the British government. *See A Way Forward for Ireland*, Manchester Guardian Weekly, Nov. 24, 1985, at 1. As a result, withdrawal or invalidation of the Anglo-Irish Agreement would have led to Ireland's withdrawal from the European Convention. *See* Anglo-Irish Communique, *supra*, para. 7 (promise by Irish government to accede to the European Convention given upon the express condition that progress is reached by an intergovernmental committee on matters of justice and security in Northern Ireland).

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14 Anglo-Irish Agreement, Nov. 15, 1985, Ireland-United Kingdom, 24 I.L.M. 1597.

15 The Irish Government had previously resisted signing the European Convention precisely because it was unwilling to abrogate the "political offence" exception to extradition and because it believed it unconstitutional to do so. *See* Connelly, *Non-Extradition for Political Offences: A Matter of Legal Obligation Or Simply A Policy Choice*, 1982 Irish Jurist 59.

The Anglo-Irish Agreement established a framework for addressing political, legal and security matters in Northern Ireland, including the administration of justice and the promotion of cross-border cooperation. From the time it was entered into in November 1985, the Anglo-Irish Agreement's continued existence was in constant doubt because it was attacked on many fronts in both the United Kingdom and Ireland. In Northern Ireland there was a concerted effort by Unionists and Loyalists, through rioting and protests, to dismantle the Anglo-Irish Agreement. *See Unionists Threaten To Make Ulster "Ungovernable"*, Manchester Guardian Weekly, Dec. 1, 1985, at 3. These efforts stood a strong chance of succeeding in that similar protests had successfully dismantled a comparable agreement in 1974. *Id.*

In addition, the legality of the Anglo-Irish Agreement was challenged in the courts of Northern Ireland, *see* Hadfield, *The Anglo-Irish Agreement—Blue Print or Green Print?*, 37 N. Ireland Legal Q. 1, 21-26 (1986), and was the subject of serious dispute in the Republic of Ireland. *See McGimpsey v. Ireland*, [1990] I.L.R.M. 441. Equally significant, the leader of the political opposition in Ireland, who was expected to gain office during the life of the Anglo-Irish Agreement, strongly opposed the Agreement and threatened to renegotiate it. *See* Kennedy, *How the South Was Won*, 257 Fortnight 13 (Dec. 1987). If any of these events had occurred and the Anglo-Irish Agreement had dissolved, Ireland's withdrawal from the Convention would undoubtedly have followed and the Extradition Act of 1987 would never have been introduced, much less come into force.

Indeed, despite the survival of the Anglo-Irish Agreement, Irish enactment of domestic legislation to implement the European Convention remained in doubt. Enactment of implementing legislation was contingent on changes in the legal system of Northern Ireland, *see* Anglo-Irish Communique, *supra* p. 15, para. 7, and the Irish government remained reluctant to introduce such legislation until these reforms were realized. *See* Kennedy, *supra*, at 13. Moreover, even when the Extradition Act of 1987 was enacted in January 1987, whether and when it would come into force as domestic

law remained uncertain because the effective date of the Act was subject to numerous contingencies.[16] Until December 1987, the majority party in Ireland opposed allowing the Extradition Act of 1987 to come into force. *Id.* It was not until December 1, 1987 that implementation of the act as law became certain. The complexity of events effecting implementation of the Convention through the Extradition Act of 1987 reveals that such implementation was uncertain and unforseeable in September 1986.

II. ASSUMING THE THRESHOLD REQUIREMENTS OF *ABUDU* ARE MET, DOHERTY IS ENTITLED TO A HEARING TO DETERMINE HIS ELIGIBILITY FOR WITHHOLDING OF DEPORTATION UNDER SECTION 243(h).

A. Under *Abudu*, the Attorney General Does Not Have the Power to "Leap Ahead" and Deny Doherty's Motion to Reopen on the Ground that He is Disqualified from Withholding of Deportation.

Once Doherty has met the threshold requirements governing a motion to reopen, he must be granted a hearing to determine his eligibility for withholding of deportation under section 243(h). The relief provided by section 243(h) is critically important because it establishes the most basic safeguards against returning aliens to countries where they are likely to be persecuted, and satisfies the United States' obligations under international covenants governing the treatment of refugees. *See INS v. Cardoza-Fonseca*, 480 U.S. at 430;

16 Section 13(2) of the Extradition Act of 1987 specified a flexible commencement date because "ratification . . . was set against the background of progress in relation to three matters under the [Anglo-Irish] Agreement: public confidence in the administration of justice in Northern Ireland, relations between the security forces and the minority community in Northern Ireland, and security cooperation between the British and the Irish Governments." Connelly, Extradition (European Convention on the Suppression of Terrorism) Act, 1987, *General Note*, 1-2 (citing 370 Dáil Debates Cols. 1379-83).

INS v. Stevic, 467 U.S. at 416-18.[17] Specifically, withholding of deportation fulfills the "non-refoulement" (no return) requirements of Article 33 of the Convention, which imposes a "mandatory duty on contracting states not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons." *INS v. Cardoza-Fonseca*, 480 U.S. at 429.[18] Upon a showing of a "clear probability" of persecution, *INS v. Stevic*, 467 U.S. at 430, withholding of deportation is mandated to protect the alien from persecution. Unlike the "broader benefits" afforded by asylum, such as permanent residence status, *INS v. Cardoza-Fonseca*, 480 U.S. at 428 n.6, withholding does not preclude deportation to non-hostile third countries, but does provide the crucial protection of temporary refuge. *Id.*

Recognizing the exceptional importance of the protections conferred by withholding of deportation, this Court in *Abudu* expressly limited the INS' authority to "leap ahead," and deny reopening to "cases in which the ultimate grant of relief is discretionary . . . ." *Abudu*, 485 U.S. at 105. Cases involving the "mandatory" relief of withholding of deportation under section 243(h) were explicitly excluded from those that can be summarily disposed of on the merits in the context of a motion to reopen. *Id.* In direct conflict with *Abudu*, the Attorney General chose to "leap ahead" and deny

17 In 1968 the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter Protocol]. The Protocol bound parties to comply with the substantive provisions of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter Convention]. The INS acknowledges in its brief to this Court that it is legally bound to apply the substantive provisions of the Convention, as a result of our country's accession to the Protocol. Pet. Br. at 24.

18 Article 33.1 of the Convention provides:

> "No Contracting State shall expel or return ['refouler'] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Convention, *supra* note 17, at 176, *reprinted in* Protocol, *supra* n.17, at 6278.

Doherty's motion to reopen on the ground that he is ineligible for withholding of deportation under two disqualification clauses that limit the reach of section 243(h). *See* 8 U.S.C. § 1253(h)(2)(A), (C) (PA at 165a).

B. An Individualized Factual Record Must Be Developed to Determine Whether Doherty is Disqualified from Withholding Under Section 243(h).

A full hearing that leads to the creation of an individualized, factual record is indispensable to determining whether Doherty falls within the limited exceptions for denying withholding of deportation under section 243(h). In finding Doherty disqualified for withholding of deportation, the Attorney General does not contest Doherty's claim that he would suffer persecution if returned to the United Kingdom. Instead he relies on two disqualification clauses that deny section 243(h) relief to otherwise eligible aliens who have engaged in persecution or committed non-political crimes.[19]

19 These clauses provide that the protection afforded by section 243(h)(1):

> shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion [or] . . .
>
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime . . ."

8 U.S.C. § 1253(h)(2)(A),(C) (PA at 165a).

The Convention contains similar disqualification clauses, but they are not worded in exactly the same way. Article 1.F of the Convention states that its provisions,

> shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Convention, art. 1.F., *supra* note 17, at 156.

These disqualification provisions must be interpreted consistently with the requirements of the Convention.[20] While the Attorney General's decision cites both provisions (Att'y Gen. Dec. at 29-35 (PA 83a-91a)), a finding of disqualification under either ground depends upon the Attorney General's description of the IRA, upon his imposition of vicarious liability on Doherty for the alleged acts of the IRA, and upon his characterization of Doherty's conduct as non-political. Necessarily, such conclusions require a hearing at which all relevant evidence is presented and considered.

For example, the determination of whether "there are serious reasons for considering" that a person "has committed a serious non-political crime" (INA § 243(h)(2)(C)), which permeates the Attorney General's analysis (Att'y Gen. Dec. at 29-35 (PA 83a-91a)), requires a detailed factual hearing. *See* UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) [hereinafter *Handbook*].[21] A careful balancing of motive and means is required to determine whether an offense is non-political.[22] A further balanc-

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20 Congress' intention that section 243(h) be interpreted in a manner consistent with the Convention is abundantly clear. The Conference report accompanying section 243(h) states that it is "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. Code Cong. & Admin. News 160, 161; *see also* Brief of Amici Members of Congress. In implementing section 243(h), the INS is therefore bound to accord Doherty at least that amount of protection from deportation as is contemplated by the Protocol and, through it, the substantive provisions of the Convention. *INS v. Stevic*, 467 U.S. at 416.

21 This Court has recognized that the *Handbook* provides "significant guidance" in interpreting the obligations under section 243(h) and the Convention. *INS v. Cardoza-Fonseca*, 480 U.S. at 439 n.22.

22 The *Handbook* advises that:

> regard should be given, in the first place to [a political offense's] nature and purpose, *i.e.*, whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offense should also outweigh its common law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offense is also more difficult to accept if it involves acts of an atrocious nature.

Handbook, *supra* p. 20, at ¶ 152.

ing is required to assess the nature of the crime and the degree of persecution feared before deciding whether adequate grounds exist for disqualifying an individual from withholding of deportation. *Handbook*, *supra* p. 20, at ¶ 156. Finally, consideration of any mitigating or aggravating circumstances is required. *Id.* at ¶ 157. Only then can the merits of the applicant's entitlement to withholding be properly determined. None of these required factors can be assessed without a fully developed factual record.

The need for a hearing to determine whether Doherty has committed "non-political crimes" is dramatically underscored by the conclusions reached by Judge Sprizzo at Doherty's extradition hearing after considering virtually identical factors. In determining whether any violent act attributed to Doherty fell within the political offense exception, Judge Sprizzo considered "the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place." *Matter of Doherty*, 599 F. Supp. at 275. In the one circumstance where Doherty was permitted to present his case, the district court reached conclusions directly contrary to those the Attorney General used to deny Doherty a hearing.

The Attorney General principally relied on *portions* of the paper record of Doherty's extradition hearing to support his finding that no hearing is required to disqualify Doherty from withholding of deportation for having committed "non-political crimes." Att'y Gen. Dec. at 29-35 (PA at 83a-91a). Judge Sprizzo reached the opposite conclusion after reviewing the *entire* evidence live and observing the credibility and demeanor of *all* the witnesses, including a full day of testi-

mony by Doherty. Rejecting any suggestion that Doherty's activities were non-political or that "violence was directed against civilian[s]," Judge Sprizzo held that the facts of Doherty's case "present the assertion of the political offense exception in its most classic form." *Matter of Doherty*, 599 F. Supp. at 275-76.[23]

Moreover, Judge Sprizzo specifically rejected some of the very arguments that the Attorney General now relies on to declare Doherty's activities as non-political. For example, the Attorney General held that "record evidence that [Doherty] . . . took over a family-occupied house in a civilian, residential neighborhood . . ." supported his finding that Doherty's activities were directed at civilians, and therefore non-political. Att'y Gen. Dec. at 33 (PA at 88a). However, after considering all testimony and observing Doherty's live testimony on this subject,[24] Judge Sprizzo bluntly rejected the government's same argument as a basis for finding Doherty's actions as non-political. Indeed, Judge Sprizzo emphasized that Doherty's actions were never "directed against civilian[s]," stating that "[w]e are not faced here with a situation in which a bomb was detonated in a department store, public tavern, or a resort hotel, causing indiscriminate personal

23 In assessing whether Doherty's acts were political, Judge Sprizzo also determined that Doherty's conduct was not "violative of international law, [nor] inconsistent with international standards of civilized conduct." *Matter of Doherty*, 599 F. Supp. at 274. Because the Convention is one of the most important international covenants defining international standards for what constitutes protected political conduct, Judge Sprizzo's holding implicitly suggests that he would not have disqualified Doherty from withholding of deportation under section 243(h).

24 Doherty consistently testified that civilians are "not the targets of the Irish Republican Army . . . the Irish Republican Army has a policy and general regulation not [to] go for civilian targets in the war zone." Transcript of Hearing (April 2, 1984) in *In re Requested Extradition of Doherty by the Government of the United Kingdom* (JA at 142-43). In addition, he testified that when he and fellow IRA members came to the house at 371 Antrim Road, they "guaranteed the lady . . . that she was not the purpose of the operation, that [Doherty and others] needed to get to the second and third floor." *Id.* (JA at 118). Doherty further testified that an unarmed IRA member watched over the family to make sure that they "didn't wander onto the street or up the stairs." *Id.* (JA at 175).

injury, death and property damage." *Matter of Doherty*, 599 F. Supp. at 275.[25] Judge Sprizzo's decision demonstrates that the Attorney General's simplistic reliance on excerpts from a paper record does not justify a determination of disqualification for withholding of deportation under section 243(h).

A hearing is particularly essential where, as here, the Attorney General infers Doherty's exclusion largely on the basis of his membership in the IRA, which is alleged to have committed disqualifying acts, rather than on acts the applicant committed personally.[26] Even if the Attorney General's unsupported proposition that conspiracy law is relevant to a withholding claim were accepted, a hearing is nonetheless required. *See United States v. Peterson*, 524 F.2d 167, 174 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976) (conspiracy involves preconcert and connivance, not just aiding and abetting the commission of a crime).[27]

25 The Government, in its post-trial brief in the extradition proceeding, unsuccessfully argued that Doherty and three other IRA members "had forcibly taken over a building and held its inhabitants hostage." Post-Trial Memorandum of the Government at 34.

26 The Attorney General's reliance on *McMullen v. INS*, 788 F.2d 591, 593 (9th Cir. 1986), for this purpose is the equivalent of erroneously giving collateral estoppel effect to an action to which Doherty was not a party and in which his interests were not represented. *See Montana v. United States*, 440 U.S. 117, 153-55 (1979) (collateral estoppel only applies to parties who have had a full and fair opportunity to litigate). McMullen was an IRA defector seeking asylum from possible persecution by the IRA, not the British Security forces or Loyalist/Unionist paramilitaries. Consequently, McMullen was seeking withholding of deportation from Ireland, not the United Kingdom. *McMullen v. INS*, 788 F.2d at 593. Rather than presenting evidence that the IRA is a paramilitary organization whose activities are directed against military targets, not civilians (precisely the kind of evidence Doherty presented at his extradition hearing and would present at a hearing on his eligibility for withholding of deportation to the United Kingdom), McMullen presented evidence documenting what he alleged to be the "terrorist activities" of the IRA. *Id.* The Attorney General's reliance on *McMullen* to deny Doherty a hearing was clearly erroneous.

27 The Attorney General's linkage of membership in an organization to alleged participation in an unlawful "conspiracy" is contrary to rulings of

The degree of proof necessary to disqualify a person for withholding also demonstrates the fallacy of the INS' contention that a premature determination of Doherty's ultimate disqualification for withholding is analogous to Doherty's obligation to present a *prima facie* case. Pet. Br. at 36. The requirement of a *prima facie* case is to decide *whether* an applicant will get a hearing. In contrast, a disqualification determination turns on the *results* of that hearing.

To establish a *prima facie* case an applicant need only "allege specific facts, which 'would, if proved, establish eligibility [for relief].' " *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (quoting *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (*en banc*), *rev'd on other grounds*, 450 U.S. 139 (1981)). In contrast the issues related to disqualification from withholding of deportation require much more than the presentation of a mere basis for denial. They involve a detailed balancing of the nature of any alleged non-political crime, motives of the applicant, and the degree of persecution feared, which can only be adequately resolved by a hearing. It borders on the Orwellian for the Attorney General to contend that he can deny Doherty's right to a hearing on the basis of a conclusion that can be reached only after a hearing has been conducted.

The crucial role that a hearing plays in determining whether an applicant is to be disqualified from withholding confirms this Court's admonition that the Attorney General

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the courts and the BIA on this issue. Refugees who have been members or active supporters of political movements which use violence to overthrow a government are consistently granted asylum and withholding of deportation. *See, e.g., Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985) (member of guerrilla group found eligible for asylum); *Matter of Rodriquez-Majano*, Int. Dec. No. 3088 (BIA Sept. 28, 1988) (individual who provided material support for guerrillas, including covering them with his weapon while they burned cars, found not to be disqualified from withholding of deportation); BIA Dec. at 3 (Heilman, J., concurring) (PA at 110a-11a) (referring to Board experience with cases involving nationals from India, Sri Lanka, Guatemala, Ghana, and El Salvador in which asylum was granted to individuals fearing government action against them because of actual or suspected involvement in guerrilla or terrorist activities).

may not "leap ahead" when the request for the underlying relief is withholding of deportation. *Abudu*, 485 U.S. at 105. In response, the INS offers only the cryptic language from this Court's decision in *Abudu* that there are "at least" three independent reasons for denying reopening. Whatever additional grounds may have been contemplated by this "at least" language, it does not encompass "leaping ahead" when the motion to reopen is for the purpose of applying for withholding since this Court expressly rejected that possibility. *Id.*

Indeed such "predetermining" of the merits of a withholding claim would eviscerate the fundamental protection that section 243(h) is designed to afford. As shown above, the grounds for denying withholding require an assessment of specific factors and a balancing of specified criteria. Neither is possible without a hearing. When a movant establishes a *prima facie* case, and demonstrates changed circumstances or a reasonable explanation for a delay, he or she is entitled to a full hearing on withholding of deportation. If the INS' position prevails, an alien who demonstrates a clear probability of persecution will be deported without ever being afforded a hearing and the opportunity to demonstrate his or her eligibility for the most fundamental protection against persecution.

III. UNITED STATES FOREIGN POLICY CONSIDERATIONS ARE NOT LEGITIMATE CONCERNS IN DETERMINING DOHERTY'S ULTIMATE ELIGIBILITY FOR ASYLUM.

A central purpose behind enactment of the Refugee Act of 1980 was the establishment of a fair and humanitarian framework for refugee protection which includes the removal of foreign policy considerations from decision-making and brings the United States into full compliance with its obligations under international law. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; *see* Brief of *Amicus Curiae* UNHCR and Brief of *Amici* Members of Congress; *see also* Lawyers Committee for Human Rights, *The Implementation*

of the Refugee Act of 1980: A Decade of Experience, (March 1990) [hereinafter LCHR Report]. The Refugee Act reformed asylum and withholding of deportation by removing ideological, political and geographical considerations. *See* Inzunza, *The Refugee Act of 1980: Ten Years After—Still the Way to Go*, 2 Int'l J. of Ref. L. 413, 417 (1990); LCHR Report, at 6.[28] We strongly endorse the arguments presented by *amici* UNHCR and Members of Congress that demonstrate that both the Refugee Act and the Convention were intended to remove foreign policy considerations from asylum decision-making. Moreover, since passage of the Refugee Act, both the INS and the courts have taken significant measures to halt discriminatory treatment of refugees on the basis of foreign policy. These additional measures further demonstrate that foreign policy considerations cannot provide a legitimate basis for a denial of asylum.

Final regulations recently were enacted in 1990 establishing procedures for obtaining asylum, based on "[a] fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process . . . ." 55 Fed. Reg. 30,675 (1990). The new regulations establish a range of measures that enhance the integrity of the asylum adjudication process, and indicate in a number of ways that United States' foreign policy considerations have no place in asylum determinations.

The new regulations remove the adjudication of asylum claims from the jurisdiction of INS District Directors and place them under the purview of Asylum Officers who are

28 The Deputy Commissioner of the INS has acknowledged that the most important change of the 1980 Refugee Act was the adoption of the international definition of "refugee" which removed the geographic and ideological restrictions of the previous definition. Inzunza, *supra*, at 417. As he pointed out:

> Implementation of the neutral refugee definition contained in the Refugee Act assumed adoption by the Immigration and Naturalization Service (INS) of an adjudication standard which was uniform worldwide, *equally applicable to all refugee and asylum applicants . . . regardless of provenance or ideology*. . . . The worldwide standard is currently an integral part of all INS refugee and asylum training.

Id. at 417-19 (emphasis added).

members of the INS Office of Refugees, Asylum and Parole. Pursuant to 8 C.F.R. § 208.1(b) (1991), these asylum officers are to be independently trained in international law and international affairs. Under 8 C.F.R. §§ 208.12-.13 (1991), they are authorized to rely on evidence about the conditions in countries of alleged persecution provided not just by the Department of State and the INS, but from a wide range of sources including international organizations and academic institutions. An asylum officer is expected to make an informed and independent decision regarding each application, based on all the relevant evidence. In addition, each asylum officer is now required to issue written decisions, detailing the basis for denials of relief and assessing the applicant's credibility in adverse decisions. *See* 8 C.F.R. § 208.17 (1991).

The new regulations also lay out explicit guidelines for the exercise of discretion on asylum applications. 8 C.F.R. §§ 208.14-.15 (1991). An Immigration Judge or Asylum Officer shall deny asylum in the exercise of discretion on one of three grounds: (1) the applicant has been convicted of a particularly serious crime in the United States, (2) the applicant has been firmly resettled within the meaning of 8 C.F.R. § 208.15, or (3) there are reasonable grounds for regarding the applicant as a danger to the security of the United States. *See* 8 C.F.R. § 208.14 (1991). However, if an asylum applicant's claim is denied on one of these three grounds, the applicant still must be given the opportunity to demonstrate, by a preponderance of the evidence, that such grounds do not apply. 8 C.F.R. § 208.14(b). There is no mention of foreign policy considerations as being one of the grounds for mandatory denial.

The INS also acted to sever the processing of asylum claims from foreign policy concerns by its resolution of long-standing complaints about the unfair denial of asylum to Salvadorans and Guatemalans. In the *ABC* Settlement, *supra*

p. 3, at 799,[29] the INS explicitly stipulated that "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." *Id.*[30]

The INS' contention that the *ABC* Settlement is irrelevant to this case because, by its terms, it only precludes foreign policy considerations in the determination of whether an individual has a well-founded fear of persecution, misses the point. *See* Reply Brief for the Petitioner On Application for a Writ of Certiorari at 3-4. Foreign policy considerations have been removed from determinations of eligibility for asylum in order to make the remedy of asylum available on a humanitarian rather than a political basis. Were the INS able to reintroduce foreign policy considerations through the exercise of discretion, the reason for removing such considerations from determinations of eligibility would be defeated and the purposes of the asylum remedy would be frustrated. The Attorney General's zeal to return Doherty to the United Kingdom cannot be permitted to unravel the non-political framework of refugee protection which is the essence of the Refugee Act.

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29 This settlement was the culmination of litigation alleging long-standing patterns of discrimination against Salvadoran and Guatemalan refugees seeking asylum in the United States. These refugees, who clearly met the requirements for obtaining asylum, were systematically denied protection because, for foreign policy reasons, the government was reluctant to be perceived as critical of the Salvadoran and Guatemalan governments. *See ABC v. Thornburgh*, Third Amended Compl., Civ. No. C-85-3255 (RFP); *see also* Carrillo, *The Application of Refugee Laws to Central Americans in the United States*, IX B.C. Third World L.J. 1 (1989); LCHR Report, *supra* p. 26, at 67-70.

30 The INS further stipulated that "whether or not the United States Government agrees with the political or ideological beliefs of the individual" is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution. *See ABC v. Thornburgh*, Third Amended Compl., Cir. No. C-85-3255 (RFP).

CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge this Court to affirm the decision of the Court of Appeals below.

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